STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM BONNER,

Defendant-Appellant.

UNPUBLISHED
March 17, 2005

No. 254093
Wayne Circuit Court
LC No. 02-014326-01

Before: Meter, P.J., and Bandstra and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to imprisonment for thirty-five to eighty years for the second-degree murder conviction, three to five years for the felon in possession of a firearm conviction, and two years for the felony-firearm conviction. We affirm defendant's convictions, but remand for resentencing on defendant's second-degree murder conviction.

This case arose out of the murder of an individual named Matthew Thomas. When he was thirteen years old, Thomas was severely burned. As a result of his injuries, he received monthly disability checks, which were deposited directly into his bank account. At about noon on October 1, 1998, Thomas went to the bank and withdrew $200 from the proceeds of his disability check. Either late in the night of October 1, 1998, or early in the morning of October 2, 1998, Thomas was shot once in the head at a house in Detroit. He died as a result of the shooting. A witness who was in the area where Thomas was killed heard a noise that sounded like a firecracker or a gunshot and then, about twenty minutes later, saw defendant near the house where Thomas was killed. In October 1998, while he was being held in the Wayne County Jail, defendant confessed to another inmate, Keith Browen, that "he laid down the demonstration" with the victim and then took the victim's money for drugs. Another witness testified that he sold defendant some crack at 1:00 a.m. on October 2, 1998, and that at that time, defendant had in his possession a wad of twenty and fifty dollar bills. Browen asserted that the phrase "laid down the demonstration" was street slang which meant that defendant killed the victim. According to Browen, defendant stated that he "laid down the demonstration" with a gun and then got rid of the gun during a chase.

Defendant first argues that the trial court abused its discretion in admitting evidence that gunshot residue was found on the sleeve of a black sweatshirt when there was no foundation established for the admission of the evidence, when there was not a proper chain of custody for the sweatshirt and when no evidence established a link between defendant and the sweatshirt. Specifically, defendant contends that the testimony of William Steiner should have been precluded. Steiner, a civilian forensic chemist with the Detroit Police Department's Crime Lab, testified that he used a scanning electron microscope to determine that one particle on the right cuff of a black hooded Vecta Sport sweatshirt was consistent with gunshot residue, but that there were not enough particles to conclusively conclude that gunshot residue was present on the sweatshirt.

We review a trial court's decision to admit evidence for an abuse of discretion. *People v Drohan*, 264 Mich App 77, 84; 689 NW2d 750 (2004). "'An abuse of discretion exists if an unprejudiced person would find no justification for the ruling made.'" *Id.*, quoting *People v Watson*, 245 Mich App 572, 575; 629 NW2d 411 (2001).

The prosecutor concedes that the chain of custody for the sweatshirt was imperfect because the police officer who confiscated the sweatshirt and the officer who conveyed the sweatshirt to forensics had both retired. However, a perfect chain of custody is not required for the admission of relatively indistinguishable items of real evidence. *People v White*, 208 Mich App 126, 132-133; 527 NW2d 34 (1994). Such evidence may be admitted where the absence of a mistaken exchange, contamination, or tampering has been established to a reasonable degree of probability or certainty. *Id.* at 133. "Once a proper foundation has been established, any deficiencies in the chain of custody go to the weight afforded to the evidence, rather than its admissibility." *Id.* In fact, the prosecutor did not offer the sweatshirt itself into evidence. However, the absence of a perfect chain of custody would not have required automatic exclusion of the sweatshirt and did not preclude testimony about evidence of gunshot residue on the sweatshirt provided there was an adequate foundation for the admission of such testimony.

We conclude that there was an adequate foundation for the admission of Steiner's testimony regarding evidence of gunshot residue on the sweatshirt. Sergeant Voizell Jennings, who was the original officer in charge of the case and was acting officer in charge of the case at the time of his testimony, testified that Officer G. Jones confiscated the sweatshirt and Officer Rosco Thomas would have processed the sweatshirt and conveyed it to the crime lab. According to Jennings, both officers had retired. Jennings further testified that the evidence list for the case indicated that a black sweatshirt had been confiscated and labeled with evidence tag 410156. We conclude that Jennings' testimony established with a reasonable degree of certainty the absence of mistaken exchange, contamination, or tampering. MRE 901(a); *id.* Therefore, there was an adequate foundation for the admission of testimony about the sweatshirt. Moreover, contrary to defendant's claim on appeal, Steiner's testimony was relevant because the victim was shot, and evidence of gunshot residue on a sweatshirt that was related to the crime meets the relevancy threshold of MRE 401 even absent explicit testimony that the police obtained the sweatshirt from defendant. We reject defendant's contention that Steiner's testimony was unfairly prejudicial and should have been excluded under MRE 403. Unfair prejudice means more than merely that the evidence is damaging to the opposing party. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). The gunshot residue evidence in this case was not highly probative because the small amount of residue was inadequate to conclusively establish

the presence of gunshot residue on the sweatshirt. However, we conclude that the marginal probative value of the evidence was not substantially outweighed by the danger of unfair prejudice because it would not tend to cause the jury to make a decision on an improper basis and there was no danger that it would be given undue or preemptive weight by the jury. *People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995); *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2002).

Defendant next argues that the trial court abused its discretion in permitting the prosecutor to read into evidence a portion of a statement Tyrica Hunter made to the police in which Hunter asserted that defendant had telephoned her from jail on October 2, 1998, and asked her to "get his gun and dope behind the Rollercade on Schaefer." According to defendant, the trial court abused its discretion in permitting the prosecutor to read Hunter's statement into evidence because the statement constituted hearsay and was more prejudicial than probative under MRE 403, and because admission of the statement without a limiting instruction at the time the statement was read violates our Supreme Court's holding in *People v Jenkins*, 450 Mich 249; 537 NW2d 828 (1995). Defendant also asserts that the prosecutor compounded the trial court's error by relying on Hunter's statement as substantive evidence of defendant's guilt during closing argument. We disagree.

During Hunter's testimony at trial, Hunter asserted that defendant telephoned her collect from jail on October 2, 1998. Hunter testified that while she remembered defendant calling her, she could not remember the substance of the conversation because it had occurred 4½ years before her testimony at trial. The prosecutor attempted to refresh Hunter's memory by asking her to read to herself her statement to the police. Hunter read her statement to herself and admitted that she gave a statement to the police and that she had signed the statement, but she continued to assert that she could not remember the details of the conversation. The prosecutor then essentially read into evidence portions of Hunter's statement to the police in an attempt to refresh her recollection about the nature of the conversation. Specifically, the prosecutor read the following portion of Hunter's statement to the police: "[Defendant] called me from the police station at Fort and Green. He asked me if I could get his gun and dope behind the Rollercade on Schaefer." Defense counsel objected and requested a limiting instruction, but the trial court stated that the prosecutor was attempting to refresh Hunter's memory and refused to give a limiting instruction at that time. However, the trial court stated on the record that it would give a limiting instruction later, if such an instruction was necessary. During its final instructions to the jury before deliberation, the trial court instructed the jury that it must be careful how it considered statements that certain witnesses had made to the police. The trial court instructed the jury that it could only use such evidence to help it decide whether it believed the witnesses' statements in court unless the witness testified that the statement was true or if the earlier inconsistent statement was made under oath subject to the penalty of perjury at a hearing or trial. In that case, the trial court informed the jury that it could consider such evidence "as proof of the facts in the statement."

In *Jenkins*, our Supreme Court held that prior inconsistent statements cannot be admitted as substantive evidence, but only for impeachment purposes. *Id.* at 261. Defendant's reliance on *Jenkins* is misplaced because while prior inconsistent statements are admissible only for impeachment purposes, Hunter's statement to the police would have been admissible as

substantive evidence of defendant's guilt under under MRE 803(5), the recorded recollection exception to the hearsay rule. MRE 803(5) provides:

> A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

There are three requirements for admission of evidence under MRE 803(5): first, the document must pertain to matters which the declarant once had knowledge; second, the declarant must now have insufficient memory of the matters; and third, the declarant must have made the document or examined it for accuracy when the matters remained fresh in the declarant's memory. *People v Daniels*, 192 Mich App 658, 667-668; 482 NW2d 176 (1992). In this case, the three requirements for the admission of evidence under MRE 803(5) are satisfied. First, Hunter's testimony at trial established that she once had knowledge of the details of the telephone conversation that she had with defendant when he called her from jail on October 2, 1998. Second, Hunter's testimony at defendant's trial occurred about 4½ years after the telephone conversation with defendant, and, while Hunter recalled having a telephone conversation with defendant on October 2, 1998, she asserted that she was unable to recall any details about the substance of the conversation with defendant even after the prosecutor attempted to refresh her memory by asking her to read to herself the statement she made to the police at that time. Accordingly, given the state of her memory, Hunter was unable to testify fully and accurately about the substance of her telephone conversation with defendant. Finally, Hunter gave her statement to the police on October 11, 1998, just slightly more than one week after defendant telephoned her from jail. Therefore, the document was made when the matters remained fresh in the declarant's memory.

Because Hunter's statement could have been admitted as substantive evidence under MRE 803(5), the trial court did not abuse its discretion in permitting the prosecutor to read portions of Hunter's statement to the police without giving a limiting instruction at the time the prosecutor read the statement. Furthermore, our review of the prosecutor's closing argument does not support defendant's contention that the prosecutor relied on Hunter's statement as substantive evidence of defendant's guilt that defendant actually asked Hunter to go and get his gun and dope. Rather, the record reflects that the prosecutor used the evidence to question Hunter's credibility and to cast doubt on her claim that she could not remember defendant asking her to retrieve his gun and dope. A prosecutor may argue from the facts that a witness is either credible or unworthy of belief. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). We observe, however, that because Hunter's statement to the police would have been admissible as substantive evidence under MRE 803(5), it would not have been error for the prosecutor to rely on it as substantive evidence of defendant's guilt during closing argument. Finally, we reject defendant's contention that the evidence was irrelevant under MRE 401 and more prejudicial than probative under MRE 403. Hunter's statement was relevant to impeach her claims that she could not remember the substance of the telephone conversation and relevant substantively to the issue of defendant's guilt. Moreover, we reject defendant's conclusory claim

that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. MRE 403.

Defendant next argues that he is entitled to additional credit for time served before he was sentenced. Whether a defendant received the proper amount of credit for time he spent in jail is a question of law. See *People v Givans*, 227 Mich App 113, 124; 575 NW2d 84 (1997). We review issues of law de novo. *People v Parker*, 230 Mich App 337, 342; 584 NW2d 336 (1998). Defendant did not raise the issue of credit for time served before the trial court. "As a general rule, issues not raised before and considered by the trial court are not properly preserved for appellate review." *People v Connor*, 209 Mich App 419, 422; 531 NW2d 734 (1995). Accordingly, this issue is not preserved for review. We review this unpreserved issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). In order to avoid forfeiture of an unpreserved issue, defendant must establish that an error occurred, that the error was plain, i.e., clear or obvious, and that the error affected defendant's substantial rights, i.e., affected the outcome of the trial court proceedings. *Id.*

Whenever a person who is convicted of a crime has served time in jail before sentencing because of his inability to furnish bond, the sentencing court "shall specifically grant credit against the sentence for such time served in jail prior to sentencing." MCL 769.11b. The sentence credit provision is remedial in nature and should be liberally construed. *People v Johnson*, 205 Mich App 144, 146; 517 NW2d 273 (1994), rev'd on other grounds *People v Seiders*, 262 Mich App 702; 686 NW2d 821 (2004). The trial court awarded defendant credit for forty-eight days for time served against his felony-firearm sentence. Defendant contends that he is entitled to additional credit for time served from July 1, 2002, to November 7, 2002. Defendant's presentence investigation report (PSIR) indicates that defendant was arrested for the instant offenses on November 7, 2002. Clearly, then, defendant's incarceration from July 1, 2002, to November 7, 2002, was not the result of his inability to post bond for the instant case. MCL 769.11b. He is therefore not entitled to credit under MCL 769.11b for that time in jail.

In addition, defendant contends that he is entitled to an additional credit of seventy-six days for time served from December 4, 2003 to February 17, 2004, and three days for time served from March 11, 2003 to March 13, 2003. Defendant's PSIR indicates that on March 26, 2002, defendant was sentenced to imprisonment for life for felony murder and assault with intent to commit murder for his role in the death of another individual. The PSIR also states that defendant was "not eligible for any credit for time served as a result of his status as a prisoner within the Michigan Department of Corrections." MCL 769.11b authorizes credit for time served on the offense of which the defendant is ultimately convicted. *Givans*, *supra* at 125-126. However, if a defendant is incarcerated because of a sentence on another unrelated conviction, he is not entitled to credit under MCL 769.11b. *People v Prieskorn*, 424 Mich 327, 340; 381 NW2d 646 (1985); *People v Ovalle*, 222 Mich App 463, 468; 564 NW2d 147 (1997). It appears from the PSIR that defendant's incarceration on the dates he alleges he should receive sentence credit for was the result of his 2002 convictions arising out of the death of the other individual, and not the result of his inability to post bond for the instant case. The trial court's calculation of defendant's sentence credit is consistent with defendant's PSIR, which indicates that defendant was entitled to credit for forty-eight days served. In light of the information contained in defendant's PSIR relating to his imprisonment as a result of other convictions not related to the

instant offenses, defendant is unable to establish plain error in the trial court's calculation of his sentence credit under MCL 769.11b.

Defendant finally argues, and the prosecutor agrees, that he is entitled to resentencing on his second-degree murder conviction because he was improperly sentenced as a fourth habitual offender for that conviction because one of the convictions that formed the basis for his fourth habitual offender status occurred after defendant committed the crimes in the instant case. A sentence may be set aside only if it is invalid. *People v Mitchell*, 454 Mich 145, 176; 560 NW2d 600 (1997); see also MCR 6.429(A) ("The court may correct an invalid sentence, but the court may not modify a valid sentence after it has been imposed except as provided by law."). A sentence is invalid when it is beyond statutory limits, when it is based upon constitutionally impermissible grounds, improper assumptions of guilt, or a misconception of law, when it conforms to local sentencing policy rather than individualized facts, or when it is based on inaccurate information. *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997).

We hold that defendant's sentence for second-degree murder is invalid. The offenses that resulted in defendant's convictions in the instant case occurred on either October 1, 1998, or October 2, 1998. The felony information charging defendant as a fourth habitual offender indicates that one of the offenses supporting the fourth habitual offender charge was a first-degree murder conviction that occurred on March 26, 2002. Because the first-degree murder conviction occurred after the offenses that resulted in defendant's instant convictions, the trial court sentenced defendant based on inaccurate information regarding defendant's fourth habitual offender status. The first-degree murder conviction occurred after defendant's instant offenses; therefore, defendant was not a fourth habitual offender as defined by the fourth habitual offender statute. The fourth habitual offender statute provides that if an individual who has been convicted of three or more felonies commits a *subsequent* felony, "the person shall be punished upon conviction of the *subsequent* felony" and sentenced to an enhanced term of imprisonment as a fourth habitual offender. MCL 769.12 (emphasis added). In this case, defendant did not commit second-degree murder *subsequent* to his first-degree murder conviction. Defendant's sentence for second-degree murder is invalid because it was based on defendant's status as a fourth habitual offender when, in fact, defendant was not a fourth habitual offender because one of the offenses that formed the basis for his fourth habitual offender status occurred after the instant offenses. We therefore remand for resentencing on defendant's second-degree murder conviction. However, we reject defendant's contention that he should be resentenced before a different judge. Defendant has cited no reasons why resentencing should be before a different judge, and there are no indications from the record that any of the reasons which might ordinarily require reassignment to a different judge exist in this case. See *People v Hill*, 221 Mich App 391, 398; 561 NW2d 862 (1997).

Affirmed, but remanded for resentencing on defendant's second-degree murder conviction. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Richard A. Bandstra
/s/ Stephen L. Borrello